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WATER RIGHTS: ENFORCING THE FEDERAL-INDIAN TRUST AFTER *NEVADA V. UNITED STATES*

Roger Florio*

Indian Reserved Water Rights and the Trust Relationship

Throughout the United States, competition is rapidly escalating for a critical and often wasted resource—water. Once considered plentiful, today water looms as the resource crisis of the future.¹ Water disputes have increasingly spawned lengthy and complex litigation, especially in the arid states of the West and Southwest.² Indian tribes have recently joined these water battles in an effort to assert their own federally reserved water rights claims.³ These claims stem from a 1908 Supreme Court ruling that entitled Indian reservations to a reserved water right sufficient to fulfill the irrigation purposes of the reservation.⁴ This concept, known as the *Winters* doctrine, established the Indians' water rights as superior to nearly all other claimants under the western system of prior appropriation.⁵

The doctrine of prior appropriation encouraged development in the water-scarce West by assuring water users of a stable water supply.⁶ Most Indian reserved rights have yet to be quanti-

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1. Sheets, *War Over Water*, U.S. NEWS & WORLD REP., Oct. 31, 1983, at 57.

2. The phenomenon of increasing western water conflict, especially over Indian rights, is explored in more detail in Riley, *The Water Wars*, 7 NAT. L.J., Feb. 18, 1985, at 1, col. 1.

3. The Indians' increasing assertiveness in bringing broad water rights claims is prompting emotional debate in an already contentious field. "Without water rights," argues one Indian attorney in the Southwest, "Indians will be unable to [participate in the economy] and be doomed to desolation, unemployment, and everything else that comes with poverty. So we're talking about the Indians' very existence and survival." *War Over Water*, *supra* note 1, at 60. The prospect that broad awards to Indians could displace other western water users has led to an acrimonious litigation atmosphere that one commentator compared to a Civil War battlefield. Riley, *supra* note 2, at 1.

4. See *Winters v. United States*, 207 U.S. 564 (1908), discussed *infra* at notes 35-43 and accompanying text.

5. Under the doctrine of prior appropriation, an appropriative water right is acquired by diverting water and applying it to a beneficial use. The first person who appropriates water gains a right that is legally superior to the rights of subsequent appropriators. The quantity of the right is measured by the amount diverted and put to beneficial use. *Arizona v. California*, 373 U.S. 546, 555 (1963). The riparian doctrine used in the eastern states gives all the landowners adjoining a body of water a right to share in its use, so long as they do not unreasonably interfere with one another. Riley, *supra* note 2, at 49, col. 1.

6. Riley, *supra* note 2, at 49, col. 1. By encouraging rapid consumption of water in an already arid region, the doctrine "just flat out ignored any environmental values." *Id.*

fied,⁷ in part because there are many unsettled issues as to the method of quantification.⁸ Thus, Indian water claims have upset the certainty and stability that the prior appropriation doctrine sought to provide.⁹ The rights claimed by Indians often conflict with already established agricultural, industrial, and residential water uses, casting a shadow over future economic development.¹⁰ It is against this background that the Supreme Court decided *Nevada v. United States*,¹¹ a claim by the Pyramid Lake Paiute Tribe for enlargement of its reserved water right, which it had asserted was not sufficient to fulfill the purposes of the Pyramid Lake Reservation.¹² Although implicitly conceding that the tribe's water appropriation was indeed inadequate,¹³ the

This consumptive philosophy, however, faces growing challenges, as illustrated by a recent California Supreme Court case that imposed a doctrine of public trust, senior to preexisting appropriative rights, to protect the environmental values of water courses. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1982), cert. denied, 464 U.S. 977 (1983). The decision in *Superior Court* mandated consideration of the public trust in all water rights decisions. The *Superior Court* plaintiff brought the suit to challenge appropriation by the city of Los Angeles from a number of streams feeding into Mono Lake in California. These diversions have caused the level of the lake to drop, which in turn has imperiled the lake's scenic beauty and ecological value. See generally Note, *Protecting the People's Waters: The California Supreme Court Recognizes Two Remedies to Safeguard Public Trust Interests in Water*, 59 WASH. L. REV. 357 (1983). The potential application of this decision to *Pyramid Lake* is obvious; a thorough discussion, however, is beyond the scope of this note.

7. U.S. G.A.O., RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION [hereinafter cited as G.A.O. REPORT], CED 78-176, Nov. 16, 1978. See *infra* note 130.

8. See generally Note, *Indian Reserved Water Rights: The Winters of our Discontent*, 88 YALE L.J. 1689 (1979).

9. Riley, *supra* note 2, at 49, col. 2.

10. Discussing the impact of unquantified Indian reserved rights upon the West, one commentator stated that the resultant uncertainty impairs planning for both state and federal water projects, creates problems for enforcement and administration of interstate water compacts, threatens non-Indian investment due to potential displacement of water rights, and also slows economic development on the reservation. Note, *supra* note 8, at 1692-94.

11. 463 U.S. 110 (1983).

12. *Id.* at 118-19.

13. The Ninth Circuit noted that under the 1944 decree in *Orr Ditch*, most of the Truckee River's water is diverted before it reaches Pyramid Lake. The government did not claim any water for fishery purposes, and the tribe's award was "limited to a small quantity of irrigation water." *United States v. Truckee-Carson*, 649 F.2d 1286, 1289 (9th Cir. 1981). Although the reservation was thought to contain about 20,000 irrigable acres, *id.* at 1290, under the *Orr Ditch* decree the tribe is only allotted enough water to irrigate about 5,875 acres. *Id.* at 1294. In his opinion for the Supreme Court, Justice Rehnquist

Court focused on the fact that their reserved right had been fixed through an earlier court decree,¹⁴ and unanimously held that adjustment of the tribe's allotment was barred by *res judicata*.¹⁵

The Pyramid Lake Reservation was set aside for the Paiute Indians of Nevada in 1859.¹⁶ It encompasses Pyramid Lake and the lower reaches of the Truckee River,¹⁷ the flow of which was the subject of this litigation. Owing to heavy utilization of the Truckee by various off-reservation interests,¹⁸ the waters of Pyramid Lake had been gradually receding. As a result, the lake's fishery, relied upon by the tribe as a primary source of income, has been threatened.¹⁹ In 1973 the government, joined by the tribe, sued to increase the allotment of water in order to maintain the level of Pyramid Lake and thereby preserve the tribe's fishery.²⁰ The United States District Court for the District of Nevada held for the defendants, citing the preclusive effect of a 1944 decree known as the *Orr Ditch* decree, which fixed the quantity of the Paiutes' reserved right.²¹ The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, holding that the prior decree was *res judicata* as to all of the parties except for the Truckee-Carson Irrigation District and the tribe.²² Because

makes only oblique reference to the inadequacy of the government's representation of the tribes. *Nevada*, 463 U.S. at 119 n.7.

14. *Nevada*, 463 U.S. at 143.

15. *Id.*

16. A 322,000-acre tract of land, including Pyramid Lake, the lands surrounding it, and the lower reaches of the Truckee River, was set aside for the Paiute Indians in 1859. President Ulysses S. Grant confirmed the withdrawal by executive order in 1874, creating the Pyramid Lake Indian Reservation. *Id.* at 115.

17. When first viewed by non-Indians in 1844, Pyramid Lake was about fifty miles long and twelve miles wide. The lake is the only habitat for a large species of cut-throat trout and the *cui-ui*, which the Indians traded with the earlier settlers. Since that time the surface area of the lake has shrunk by about 20,000 acres; the *cui-ui* is classified as an endangered species, and the Lahotan cut-throat is classified as threatened. *Nevada*, 463 at 114-15; *Truckee-Carson*, 649 F.2d at 1290, 1294.

18. Non-Indian interests that depend upon the Truckee River for water include the residents of Reno, Nevada, the Newlands Irrigation Project, which diverts about 200,000 acre-feet of water per year from the river, and the Stillwater Wildlife Refuge, which depends upon return flows from the Newlands project for its water. G.A.O. REPORT, *supra* note 7, at 36.

19. Tribal members testified that the Pyramid Lake fishery contributed approximately \$100,000 per year to the income of the tribe and employed forty Indians on a full-time basis. *Id.*

20. *Nevada*, 463 U.S. at 118.

21. *Id.* at 119-20.

22. *Truckee-Carson*, 649 F.2d at 1289.

these parties had been represented by the government in the earlier *Orr Ditch* litigation, the court found that their interests were not adverse and that they were not bound by the litigation.²³ The Supreme Court reversed this section of the circuit court's opinion, holding that *res judicata* barred any changes in fixed water appropriations. The Court based its holding upon two major premises: First, traditional adversity requirements do not apply to water right adjudications because all parties to a water rights adjudication are sufficiently adverse to bind themselves and their successors by the ensuing decree.²⁴ Second, the traditional fiduciary duty of the United States toward the Indians is weakened where the government is charged with conflicting responsibilities by Congress.²⁵

The "traditional fiduciary duty" to which the Court referred originated in two early Supreme Court opinions written by Chief Justice John Marshall. In these decisions, *Cherokee Nation v. Georgia*²⁶ and *Worcester v. Georgia*,²⁷ Justice Marshall characterized the relationship between the Indians and the government as that of a ward to its guardian.²⁸ The courts subsequently elevated Marshall's guardianship characterization into a source of broad federal power to regulate Indian affairs.²⁹ In recent years, however, the Indians have successfully argued in a number of cases that this plenary power gives rise to attendant responsibilities on the part of the government.³⁰ The United States, the Court wrote in 1942, "has charged itself with moral

23. *Id.* at 1309-11.

24. *Nevada*, 463 U.S. at 136-40.

25. *Id.* at 142.

26. 30 U.S. (5 Pet.) 1 (1831).

27. 31 U.S. (6 Pet.) 515 (1832).

28. *Cherokee Nation*, 30 U.S. (5 Pet.) at 26; *Worcester*, 31 U.S. (6 Pet.) at 551.

29. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1223 (1975).

30. See, e.g., *Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F. Supp. 536 (D.N.M. 1979) (government liable for breach of fiduciary duty in mismanagement of oil and gas lease); *Edwardson v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973) (Alaska natives stated claim for breach of trust against federal officials who allowed oil companies to trespass on native lands); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (federal government ordered to manage trust funds prudently); *Coast Indian Community v. United States*, 550 F.2d 639 (Ct. Cl. 1977) (government liable for granting county right of way over Indian land at far below its market value); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966) (government liable for mismanagement of helium lease). See also *infra* notes 76-85 and accompanying text.

obligation of the highest responsibility and trust.”³¹ The Court further states that “the most exacting fiduciary standards” should be applied to determine the government’s adherence to its responsibilities under the trust relationship.³² Although its viability has recently been called into question,³³ the Indian trust doctrine has reemerged as a continuing source of federal responsibility toward the Indians.³⁴

This note will briefly trace the development of the *Winters* doctrine and the trust relationship. *Nevada* will then be examined to observe the interaction of these doctrines. Analysis of the *Nevada* decision will suggest that the Court unnecessarily weakened the government’s trust responsibilities where the United States represents both Indian and non-Indian interests. Finally, the implications of the Court’s decision in *Nevada* for both Indian water issues and breach of trust claims will be discussed.

Indian Reserved Water Rights: The Winters Doctrine

The reserved water rights doctrine was first applied by the Supreme Court in 1908 in *Winters v. United States*.³⁵ The government sued to prevent a number of private parties from diverting the waters of the Milk River in Montana upstream from the Fort Belknap Indian Reservation, thereby impeding water flowing to the reservation. Although large areas of the reservation were cultivated or used for pasture, these uses depended on irrigation water because the reservation land was arid.³⁶ The non-Indian users emphasized that they had put the waters of the Milk River to beneficial use well before the Indians and therefore claimed that their prior appropriation must be recognized under the laws and customs of Montana.³⁷ Furthermore, the non-Indian users argued that they would have to abandon this land if deprived of

31. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). See *infra* notes 77-80 and accompanying text.

32. *Seminole Nation*, 316 U.S. at 296-97.

33. *United States v. Mitchell* (Mitchell I), 445 U.S. 535 (1980), *reh. denied*, 446 U.S. 992. See generally, Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U.L. REV. 635 (1982).

34. See *United States v. Mitchell* (Mitchell II), 463 U.S. 206 (1983).

35. 207 U.S. 564 (1908).

36. *Id.* at 566-67. The Indians of the Fort Belknap Reservation, with the aid and encouragement of the government, had irrigated some 30,000 acres of land in order to raise grain, grass, and vegetables; it was alleged that all of the waters of the Milk River were necessary to fulfill these and other purposes of the reservation. *Id.*

37. *Id.* at 568-69.

the water because it could not be successfully cultivated without diversions from the Milk River.³⁸ To resolve the *Winters* dispute, the Court focused on an 1888 agreement in which the tribes relinquished a large tract of land that Congress had set aside for them in 1874³⁹ in exchange for the creation of the present-day Fort Belknap Reservation.⁴⁰ Justice McKenna, writing for the majority,⁴¹ noted that the government's purpose in establishing the reservation was to enable the Indians to convert from a nomadic way of life to a "pastoral and civilized" existence.⁴² Because the lands reserved were "arid and, without irrigation, were practically valueless," this purpose could not be achieved without a simultaneous reservation of water sufficient to enable such use.⁴³

Much of the controversy surrounding Indian reserved rights stems from the fact that the *Winters* Court set no standard by which the reserved water right could be quantified.⁴⁴ In *Conrad Investment Co. v. United States*,⁴⁵ decided shortly after *Winters*, the Ninth Circuit Court of Appeals was presented with an almost identical fact situation involving the arid Blackfoot Reservation in Montana, which requires irrigation water for agricultural uses.⁴⁶ The court held that, under the *Winters* decision, the Blackfoot Tribe held a "paramount right" to use the disputed waters of a creek for purposes of "irrigation and stock raising and domestic and other useful purposes."⁴⁷ The court found that the *Winters* right encompassed not only the water needed for current uses, but future needs as well.⁴⁸ Several other lower court decisions dealt with the quantification of water rights, but no definitive standard was adopted.⁴⁹ As a result, water users with a

38. *Id.* at 569.

39. Act of Apr. 15, 1874, ch. 96, 18 Stat. 28.

40. Act of May 1, 1888, ch. 213, 25 Stat. 113.

41. Justice Brewer was the lone dissenter. See 207 U.S. at 578.

42. *Id.* at 576.

43. *Id.* at 576-77.

44. Although the Supreme Court in *Winters* did not articulate a standard by which the reserved water right should be measured, the lower courts spoke of "sufficient waters of the Milk River . . . to insure to the Indians the means wherewith to irrigate their farms." 143 F. 740, 746 (9th Cir. 1906).

45. 161 F. 829 (9th Cir. 1908).

46. *Id.* at 830-31.

47. *Id.* at 831.

48. *Id.* at 832.

49. Two early Idaho cases held that the quantity of water reserved for the Indians was that amount needed to irrigate all the reservation lands susceptible of irrigation.

later priority date than Indian appropriators could not be certain whether future Indian water needs would displace their uses.⁵⁰

In its 1963 decision in *Arizona v. California*,⁵¹ the Supreme Court attempted to resolve this uncertainty by holding that the quantity of reserved water was that amount needed to irrigate all of the practicably irrigable acreage within the Indian reservation.⁵² Because it determined that this amount would satisfy both the present and future needs of the Indians, the Court concluded that this was "the only feasible and fair way by which reserved water for the reservations can be measured."⁵³ The Court went on to set fixed appropriations for the tribal water claimants represented by the government in this litigation, based on the amount of irrigable acreage within their reservations.⁵⁴

In a postscript to this decision, the tribes represented by the government in the original *Arizona* decision (*Arizona I*) sought to intervene in 1977 in order to petition the Court to reopen the decree.⁵⁵ The tribes, joined by the government, maintained that the amount of practicably irrigable acres within the reservations had been underestimated, and, as a result, they were not awarded all of the water to which they were entitled.⁵⁶ In *Arizona II*, a five-Justice majority,⁵⁷ emphasizing that the irrigable acreage standard was selected in order to provide a fixed and certain allotment, rested on the principles of finality in refusing to reopen the decree.⁵⁸

Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928). In United States v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956), the court rejected an argument that the reserved right should be limited to an amount the Indians could put to beneficial use within a reasonable period of time, stating that the right was intended for future as well as present uses. *Id.* at 326. But see United States v. Walker River Irrig. Dist., 104 F.2d 334 (9th Cir. 1939) (Indians' experience over past eighty years held to be an indication of their needs); Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968) ("need and use are prerequisite to any water rights on Indian reservations").

50. Riley, *supra* note 2, at 1, col. 3.

51. 373 U.S. 546 (1963).

52. *Id.* at 600.

53. *Id.* at 601.

54. *Id.* at 596, 601.

55. *Arizona v. California*, 460 U.S. 605 (1983).

56. *Id.* at 628.

57. Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, wrote the majority opinion. Justice Brennan, concurring in part and dissenting in part, was joined by Justices Blackmun and Stevens. Justice Marshall took no part in the consideration or decision of this case.

58. *Arizona II*, 460 U.S. at 628.

The Federal-Indian Trust Relationship

The federal Indian trust doctrine evolved gradually from dicta in two early opinions by Chief Justice John Marshall. In the first case, *Cherokee Nation v. Georgia*,⁵⁹ the Cherokee Tribe sought to invoke the Court's original jurisdiction in order to enjoin enforcement of Georgia laws giving the state jurisdiction over people residing on the Indian lands.⁶⁰ In concluding that the tribe was not a foreign state under the Constitution, and thus did not come within the Court's original jurisdiction,⁶¹ Justice Marshall described the Indian tribes as "domestic dependent nations."⁶² They were, Justice Marshall continued, "in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."⁶³

The Supreme Court reiterated this view of the relationship between the tribal Indians and the federal government in *Worcester v. Georgia*.⁶⁴ In striking down the Georgia statutes it had refused to consider in *Cherokee Nation*, the Court cited the dependent status of the Indian tribe as a separate nation, "claiming and receiving the protection of one more powerful."⁶⁵ The Chief Justice went on to emphasize that the tribal right to all the lands within their reservations "is not only acknowledged, but guaranteed by the United States."⁶⁶ Justice Marshall's statements of the federal trusteeship over Indian affairs sprang not from the Constitution or judicial precedent but from his own conscience and moral principles.⁶⁷ As a result, the trust relationship as articulated by Chief Justice Marshall was ambiguous in scope; yet his statements became the foundation upon which the current Indian trust doctrine was constructed.⁶⁸

The trust relationship, as envisioned by Justice Marshall, was subsequently seized upon as a source of independent federal power over Indian affairs. In *United States v. Kagama*,⁶⁹ and

59. 30 U.S. (5 Pet.) 1 (1831).

60. *Id.* at 1-14.

61. U.S. CONST. art. III, § 2, cl. 2.

62. 30 U.S. (5 Pet.) at 17.

63. *Id.*

64. 31 U.S. (6 Pet.) 515 (1832).

65. *Id.* at 555.

66. *Id.* at 557.

67. Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 424-25 (1984).

68. *Id.*

69. 118 U.S. 375 (1886).

Lone Wolf v. Hitchcock,⁷⁰ the Supreme Court emphasized the powers of the United States as guardian, rather than its concomitant responsibilities toward its Indian wards. In *Kagama* the Court considered the constitutionality of the Major Crimes Act,⁷¹ enacted in order to extend federal criminal authority to the Indian reservations. Conceding the law could not be supported by the commerce clause,⁷² the Court held that Congress' power to enact the law arose from its duty to protect the Indians, which in turn was derived from the tribes' "very weakness and helplessness."⁷³ The *Lone Wolf* decision built upon *Kagama*, producing perhaps the most expansive statement of congressional power over the Indians. *Lone Wolf* involved a challenge to a congressional statute that authorized allotment of tribal lands to individual Indians and the sale of unallotted lands to non-Indians, in violation of an 1887 treaty.⁷⁴ In upholding the power of Congress unilaterally to abrogate or modify an Indian treaty, the Court stated that "[p]lenary power over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."⁷⁵ Justice Marshall's guardianship principle had thus evolved into a source of expansive federal power to regulate Indian affairs.

If the original trust doctrine had become a sword by which the government exerted its power over the Indians, a developing line of Supreme Court decisions proved that this sword had two edges. As early as 1919, the courts began using the trust responsibility in enforcing limitations on the manner in which the government carried out its regulation of Indian affairs.⁷⁶ The clearest expression of the scope of the federal obligation came in *Seminole Nation v. United States*.⁷⁷ This decision arose out of an action by the tribe against the government for mismanagement of certain trust funds under the provisions of an 1866 treaty.⁷⁸

70. 187 U.S. 553 (1903).

71. 18 U.S.C. § 1153 (1982).

72. U.S. CONST. art. I, § 8, cl. 3.

73. *Kagama*, 118 U.S. at 384.

74. *Lone Wolf*, 187 U.S. at 561-62.

75. The *Lone Wolf* doctrine has been made somewhat more benign by subsequent case law limiting the power of Congress to abrogate treaties by the fifth amendment doctrine of just compensation. See Chambers, *supra* note 29, at 1229.

76. See *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). See generally Chambers, *supra* note 29, at 1230-34.

77. 316 U.S. 286 (1942).

78. *Id.* at 286.

Specifically, the tribe claimed that the government had breached its trust relationship by disbursing Indian funds to the Seminole General Council, which, the petitioners alleged, was defrauding the individual members of the Seminole Nation.⁷⁹ In remanding this issue to the Court of Claims, the Court focused on the "distinctive obligation of trust" placed upon the government in its dealings with the Indians. The Court stressed that the government had charged itself with moral obligations of the highest "responsibility and trust," which should be judged by "the most exacting fiduciary standards."⁸⁰

In *Pyramid Lake Paiute Tribe v. Morton*,⁸¹ the United States District Court for the District of Columbia applied the private fiduciary standard of *Seminole Nation* to stem the decline of the Pyramid Lake fishery, the same problem that ultimately prompted the *Nevada* litigation. In *Pyramid Lake*, the Paiute Indians successfully invoked the trust doctrine to restrain the government from diverting unappropriated waters of the Truckee River and thereby speeding the destructive lowering of Pyramid Lake.⁸² Previously, the Secretary of the Interior had divided the unappropriated water of the Truckee River between the Truckee-Carson Irrigation District and the Pyramid Lake Tribe.⁸³ The district court held that, in order to uphold his fiduciary duty as outlined in *Seminole Nation*, "the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake."⁸⁴ By failing to do so, the court found that the Secretary had deprived the tribe of water without any legal justification.⁸⁵

In *Pyramid Lake*, the Paiute Indians were successful in using the trust relationship to obtain increased rights to unappropriated water and thereby help forestall the gradual lowering of the lake.⁸⁶ In *Nevada*, the tribe sought to enlarge its reserved water appropriation in order to obtain the remaining water needed to preserve the lake.⁸⁷ Although this case involved a previously adjudicated appropriation, the tribe again alleged that the govern-

79. *Id.* at 296.

80. *Id.* at 296-97.

81. 354 F. Supp. 252 (D.D.C. 1973).

82. *Id.* at 258. See *supra* notes 11-20 and accompanying text.

83. *Pyramid Lake*, 354 F. Supp. at 255-56.

84. *Id.* at 256.

85. *Id.* at 257.

86. See *supra* notes 81-85 and accompanying text.

87. See *supra* notes 11-20 and accompanying text.

ment had failed in its trust obligations by not claiming sufficient *Winters* rights in its earlier representation of the tribe.⁸⁸

*Nevada v. United States: The Supreme Court
Narrows the Trust Relationship*

In *Nevada v. United States*, the Supreme Court denied the Paiute Indians' request for enough reserved water to maintain the viability of Pyramid Lake and the Truckee River as fish-spawning grounds. The Court's unanimous decision agreed with the Ninth Circuit that the cause of action raised by the Indians in *Nevada* was the same as that asserted previously in *Orr Ditch* and was therefore precluded by *res judicata*.⁸⁹ Because the government had represented both the Indians and the irrigation district in the prior litigation, however, the lower court determined that these parties were not bound by *Orr Ditch* because their interests had not been adverse.⁹⁰ Justice Rehnquist, writing for the Court,⁹¹ disagreed with the Ninth Circuit on this issue, holding that all parties,⁹² and even nonparties such as subsequent appropriators, were bound by the *Orr Ditch* decree.⁹³

The Court began its analysis⁹⁴ by considering whether the same cause of action was applied in both *Orr Ditch* and *Nevada*.⁹⁵ In concluding that the government intended to litigate the entire

88. *Truckee-Carson*, 649 F.2d at 1295. See *Winters v. United States*, 207 U.S. 564 (1908).

89. *Nevada*, 463 U.S. at 134.

90. *Truckee-Carson*, 649 F.2d at 1309-11.

91. Justice Brennan filed a brief concurring opinion. 463 U.S. at 144. See *infra* notes 119-123 and accompanying text.

92. *Nevada*, 463 U.S. at 135-44.

93. *Id.* at 144.

94. The government initially argued that it should be permitted to reallocate the water decreed in *Orr Ditch* from reclamation project uses to reservation uses because it had represented both parties in the earlier adjudication. Justice Rehnquist cited *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Ickes v. Fox*, 300 U.S. 82 (1937), which indicated that the beneficial ownership of water rights in irrigation projects constructed under the Reclamation Act of 1902 resided in the individual landowners rather than the United States. The Court therefore dismissed the government's reallocation arguments, stating that:

The Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Nevada, 463 U.S. at 126.

95. *Nevada*, 463 U.S. at 130.

reserved right for the Indians in *Orr Ditch*, the Court cited the preclusive language of the decree itself,⁹⁶ as well as the complaints in both proceedings. Although the *Nevada* complaint emphasized the water needed to preserve the fishery,⁹⁷ while the *Orr Ditch* litigation focused more on agricultural and domestic needs,⁹⁸ the Court stated that each use was embraced within the same reserved right.⁹⁹ Having determined that the identical cause of action was raised in both proceedings, the Court went on to consider whether all of the parties were bound by the earlier decree.¹⁰⁰

The Court easily found that both the government and the tribe were parties to *Orr Ditch*. In holding that the tribe was a party, the Court reaffirmed the principle that once the United States has litigated on behalf of a tribe, the Indians cannot relitigate on their own behalf.¹⁰¹ The Court next considered whether the Truckee-Carson Irrigation District could use the decree against

96. The decree provided in part that "each of [the parties] is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries." *Id.* at 132.

97. The *Nevada* complaint provided in part that:

Members of the Pyramid Lake Paiute Tribe of Indians . . . have relied upon water from the Truckee River for irrigation, for domestic uses, for maintenance of the lower segment of the Truckee River as a natural spawning ground for lake fish and for maintenance of the lake as a viable fishery.

Id. at 133-34.

98. In the *Orr Ditch* complaint, the government focused on "protecting [the] Indians and their descendants in their homes, fields, pastures, fishing, and their use of said lands and waters." *Quoted in Nevada*, 463 U.S. at 133. Although the Court left unanswered the question of whether adjudication of Indian reserved water rights can be split according to use, it agreed with the lower court that the government had not done so in this case. *Id.* at 134, n.13. In the future, however, tribes that have not yet litigated their *Winters* rights may make several different *Winters* claims based on different uses of the reserved water, thereby enabling those tribes to expand their reserved right over time.

99. *Id.* Regardless of whether Justice Rehnquist was correct in finding that a fishery right had been asserted on behalf of the Indians in *Orr Ditch*, it is clear that the final *Orr Ditch* decree awarded only irrigation water to the Indians and did not encompass a fishery water right. *Truckee-Carson*, 649 F.2d at 1290-95. See also *supra* note 13.

100. *Nevada*, 463 U.S. at 134-35.

101. "[I]t could not . . . be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." *Id.* at 135 (quoting *Heckman v. United States*, 224 U.S. 413, 446 (1912)). Although this rule has not been strictly adhered to where the interests of the representative parties conflicted with those of persons represented, see RESTATEMENT (SECOND) OF JUDGMENTS § 42(d) (1982). See also *Hansberry v. Lee*, 311 U.S. 32, 44 (1940), where Justice Rehnquist chose to carve out an exception to this exception where the United States is representing Indian parties whose interests conflict with its own. See *infra* notes 109-118 and accompanying text.

the tribe. The crux of the Supreme Court's difference with the court of appeals was the significance of the fact that both were represented by the same government attorneys.¹⁰² The reduced emphasis that the Supreme Court placed upon the requirement of adversity was rooted in the very nature of the litigation. Because of the interdependent nature of water rights, the Court stated, all water users must be bound in all combinations in an adjudication of those rights in order that stability may be achieved.¹⁰³ Adversity of the parties is thus of little consequence in the specialized field of western water adjudications.¹⁰⁴

The heightened finality interest in water adjudications is underscored by the Court's holding that nonparties such as subsequent appropriators of the Truckee River could also rely on the *Orr Ditch* decree.¹⁰⁵ Although the requirement of mutuality is a part of the doctrine of *res judicata*,¹⁰⁶ the Court agreed with the Ninth Circuit that an exception was merited for water adjudications, which are in the nature of *in rem* proceedings.¹⁰⁷ Without such an exception, the Court noted, it would be impossible to quantify finally a reserved water right.¹⁰⁸

Having concluded that once the United States has litigated a reservation's reserved water rights, a tribe cannot relitigate on the basis of evidence that the award was deficient, the Court considered whether the quality of the government's representation could change this result. Upon a thorough consideration of the record,¹⁰⁹ the court of appeals, citing the *Restatement (Second) of Judgments*, had determined that the government had compromised its duty of undivided loyalty to the tribes.¹¹⁰ Although the Court stated that "a strict adversity requirement does not

102. *Nevada*, 463 U.S. at 139.

103. *Id.* at 140.

104. *Id.*

105. *Id.* at 144.

106. The Court recognizes that mutuality has been largely abandoned in cases involving collateral estoppel, see, e.g., *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979), but finds that, with certain exceptions, it remains a part of *res judicata*. *Id.*, citing 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4464, at 586-88. (1981 & Supp. 1985).

107. The *res judicata* effect of an equitable *in personam* action would normally be limited to the parties and their privies, thus not binding subsequent water appropriators. *Truckee-Carson*, 649 F.2d at 1308.

108. *Nevada*, 463 U.S. at 144.

109. *Truckee-Carson*, 649 F.2d at 1290-94.

110. *Id.* at 1309.

necessarily fit the realities of water adjudications,"¹¹¹ it nevertheless concluded that the government's compromised role compelled a showing of strict adversity between the tribe and the irrigation district.¹¹²

The Supreme Court, however, took issue with the lower court's use of the *Restatement (Second) of Judgments* in evaluating the government's performance of its trust duties. While acknowledging the principle enunciated in *Seminole Nation*, that "the United States undoubtedly owes a strong fiduciary duty to its Indian wards,"¹¹³ Justice Rehnquist proceeded to carve out an exception to this responsibility where Congress has imposed conflicting duties on the Secretary of the Interior.¹¹⁴ In this situation, the Court stated, "the Government cannot follow the fastidious standards of a private fiduciary."¹¹⁵ Justice Rehnquist conceded that where a relationship is only between the government and a tribe, the private fiduciary analogy may be controlling.¹¹⁶ But this cannot be the case, he wrote, where Congress has imposed a duty to obtain water rights for a federal irrigation project upon the United States in addition to its duties to represent Indian tribes.¹¹⁷ By emphasizing the government's regulatory authority over Indian affairs, rather than its concomitant responsibilities, Justice Rehnquist's reasoning avoids the fiduciary edge of the trust sword and harkens back to the plenary power edge.¹¹⁸

It is this feature of Justice Rehnquist's opinion that Justice Brennan objected to in his short concurrence.¹¹⁹ While agreeing that the tribe was bound under the prior decree, Justice Brennan argued that the Indians must still have a remedy in cases in which the United States breaches its trust duties through inadequate representation.¹²⁰ The non-Indian interests at stake in *Nevada*, Justice Brennan reasoned, should only be protected on the understanding that the Paiute Indians could sue the United

111. *Id.*

112. *Id.* at 1310.

113. *Nevada*, 463 U.S. at 142.

114. *Id.* at 128, 142.

115. *Id.* at 128.

116. *Id.* at 142.

117. *Id.*

118. *Id.* (quoting *Heckman v. United States*, 224 U.S. 413, 444-45 (1912) ("It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care.")).

119. *Nevada*, 463 U.S. at 145-46.

120. *Id.*

States.¹²¹ The concurrence recognized that because there was not enough water to satisfy the needs of all the parties to this litigation, some interests, such as those of the Paiute Indians here, must suffer.¹²² Yet, where such "loss, destruction, and profound disappointment" could have been avoided, Brennan wrote, the law should provide appropriate compensation.¹²³

Implications of the Nevada Decision

In *Nevada v. United States*, the Supreme Court has once again demonstrated its unwillingness to reconsider an appropriation of water that has already been fixed through a prior court decree. In *Nevada* the Court unanimously applied the doctrine of res judicata to bar the Indians from relitigating their reserved right.¹²⁴ In *Arizona v. California*, decided only weeks before *Nevada*,¹²⁵ the Court had relied upon the principles of finality underlying the doctrine of res judicata to achieve the same result in a situation where the doctrine was inapplicable.¹²⁶ It is apparent, therefore, that tribes whose reserved water rights have already been litigated are not likely to see their appropriation enlarged. In both *Arizona* and *Nevada*, there is ample evidence that the tribes did not receive a reserved water right adequate to fulfill the purposes for which the reservation was established.¹²⁷

121. *Id.*

122. *Id.*

123. *Id.* Justice Rehnquist noted that the tribe had already sued the government before the Indian Claims Commission for damage to the Pyramid Lake fishery suffered as a result of the tribe's receipt of less water for the fishery than it was entitled to. The Commission found the government liable for damage to the fishery, *Northern Paiute Nation v. United States*, 30 Ind. Cl. Comm. 210 (1973), and subsequently approved a compromise settlement of eight million dollars in the tribe's favor. *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm. 256 (1975). See *Nevada*, 463 U.S. at 135 n.14.

124. *Nevada*, 463 U.S. at 111.

125. *Arizona v. California*, 460 U.S. 693 (1983). See also *supra* notes 55-58 and accompanying text.

126. *Arizona*, 460 U.S. at 609-29. Although the Indians' reserved water right had previously been litigated and fixed by decree in *Arizona I*, res judicata did not control the outcome of the *Arizona II* decision. Because the *Arizona* dispute arose under the Supreme Court's original jurisdiction, see U.S. CONST. art. III, § 2, with a decree that included a provision for the retention of jurisdiction for the purposes of modification, *Arizona I*, 376 U.S. at 353, the majority acknowledged that it had the power to reopen the matter. *Arizona II*, 460 U.S. at 618.

127. A newspaper reported that the five tribes involved in the *Arizona* litigation received approximately 22 percent less water than they were entitled to. Barbash, *Too Late to Erase U.S. Error in Indian Pact, Court Holds*, Wash. Post., Mar. 31, 1983, at A1, col. 4. A special master appointed in *Arizona* found that at least 18,500 acres of irrigable

These cases do not necessarily restrict the breadth of the *Winters* doctrine, however. The doctrine itself remains intact; in fact, the Court reaffirmed the controversial irrigable acreage standard of quantification in *Arizona*.¹²⁸ Moreover, in *Nevada* it refused to rule out the possibility that reserved water for different uses (i.e., agricultural versus fishery uses) could be litigated in different proceedings.¹²⁹ Tribes whose reserved water rights have not yet been fixed by court decree will therefore not be adversely affected by the Court's emphasis on the sanctity of finally determined water rights.¹³⁰

The *Nevada* decision has weakened the federal Indian trust, however, by effectively severing water adjudication from the government's trust responsibilities.¹³¹ Because of the pervasive federal involvement in the development of western water projects, the United States will nearly always be in a position of inherent conflict when it seeks to litigate a reserved right on behalf of an Indian tribe.¹³² Where Congress has charged the government with representing not only the Indian tribe but also a conflicting public interest, Justice Rehnquist held that the private fiduciary standards of *Seminole Nation* should not be applied to evaluate its conduct.¹³³ The Ninth Circuit's decision that the Indians and the irrigation district were not adverse parties was bolstered by, but by no means rested on, the court's view that the

land were overlooked and thus would have supported an award of additional water rights had they been identified in 1963. *Arizona II*, 460 U.S. at 644. In *Nevada*, the Paiute Indians were awarded only enough water to irrigate 5,875 acres of some 20,000 irrigable acres thought to be within the reservation boundaries. See *supra* note 13.

128. *Arizona I*, 373 U.S. at 600-01.

129. *Nevada*, 463 U.S. at 135 n.13. See also *supra* note 98.

130. "[M]ost Indian water rights have never been quantified." DuMars & Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 NAT. RES. J. 17 (1980). Decisions such as those in *Arizona* and *Nevada* may therefore have some beneficial effect in encouraging Indians to be zealous advocates of their own interests in water rights litigation.

131. See *supra* notes 113-118 and accompanying text.

132. Commentators have noted that Indian water resources were largely ignored "[w]hile massive federal financial and other resources were committed to the development of water resources on non-Indian lands in the West." DuMars & Ingram, *supra* note 130, at 42. See also Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 L. & CONTEMP. PROBS. 97, 131 (1976) ("The stark truth of the matter is that, beginning at the turn of the century, the offices and powers of the national government were marshalled to plan, construct, and finance non-Indian agricultural development in the West, and nothing comparable was done for the Native American.").

133. *Nevada*, 463 U.S. at 143. See also *supra* notes 113-118 and accompanying text.

United States had failed to meet its trust duties.¹³⁴ A narrowing of the trust responsibility was therefore not essential to a refutation of the lower court's reasoning.

Given the emphasis the Supreme Court places on maintaining the certainty and stability embodied in water appropriations fixed by court decree, it is apparent that the Paiute Indians would not be permitted to reopen the *Orr Ditch* decree, no matter how strong the evidence that the earlier representation had been compromised by an impermissible conflict of interest.¹³⁵ Such evidence could be used, however, to support an action for breach of trust, enabling the tribe to gain compensation for its loss.¹³⁶ The breach of trust remedy would therefore allow the tribe to recover its losses stemming from inadequate government representation in *Orr Ditch*, while protecting the rights of innocent third parties who had relied on the decree.¹³⁷

The Court's unwarranted and unnecessary narrowing of the trust responsibility in *Nevada* may ultimately deprive Indians of even this option in future actions in which the United States has represented multiple interests.¹³⁸ This point may be demonstrated by an exploration of the effect the *Nevada* decision could have on several cases considered earlier. In *Pyramid Lake Paiute Tribe v. Morton*,¹³⁹ the United States District Court for the District of Columbia held that the Secretary of the Interior had violated his trust duty by his allocation of unallotted water between the tribe and the irrigation district.¹⁴⁰ "In order to fulfill his fiduciary duty," the court wrote, "the Secretary must insure . . . that all water not obligated by Court decree or contract with the District

134. See *supra* notes 109-112 and accompanying text.

135. In both *Arizona II* and *Nevada* the Court stressed the heightened interest in certainty and finality that attaches to water rights adjudications. See *supra* notes 124-127 and accompanying text.

136. As observed *supra* at note 123, the Paiute Indians obtained an award of eight million dollars before the Indian Claims Commission "on its claim for damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation." *Truckee-Carson*, 649 F.2d at 1295 (quoting *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm. 256 (1975)). In his concurrence, Justice Brennan stated that if "the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it." *Nevada*, 463 U.S. at 144.

137. See *infra* notes 152-155 and accompanying text.

138. See *infra* notes 139-152 and accompanying text.

139. 354 F. Supp. 252 (D.D.C. 1973). This case is discussed *supra* at notes 81-86 and accompanying text.

140. *Pyramid Lake*, 354 F. Supp. at 258.

goes to Pyramid Lake."¹⁴¹ Were this case to come into the courts after *Nevada*, the private fiduciary standard of *Seminole Nation*,¹⁴² relied upon by the *Pyramid Lake* court, would no longer be applicable because the Secretary was in a position that required him to balance competing interests.¹⁴³

The Supreme Court's decision in *Nevada* may also adversely affect the five tribes whose water rights were adjudicated in *Arizona v. California*.¹⁴⁴ A special master appointed by the *Arizona* Court concluded that the reserved water rights awarded the tribes were deficient due to an error in the government's calculation of the irrigable acreage within their reservations.¹⁴⁵ Although the Court refused to reopen the decree to consider whether the tribes' allotment should be enlarged,¹⁴⁶ the tribes retained the option to sue the government for inadequate representation of their interests.¹⁴⁷ The odds for success in such a suit have been reduced, however, in the wake of *Nevada*. The *Arizona* case began as a comprehensive adjudication of water rights within the lower Colorado River basin.¹⁴⁸ In the original proceedings, the United States asserted claims to water for use on various federal lands and projects as well as for the Indian reservations.¹⁴⁹ As in *Nevada*, the Indians claimed that their water shortfall was due to a conflict of interest on the part of the government.¹⁵⁰ Because, under *Nevada*, the trust duties of the United States are subject to a lower standard in the conflict of interest situation, recovery of adequate compensation in lieu of their full reward will thus be more difficult for the tribes.¹⁵¹

Similarly, the Paiute Indians now face increased hurdles to a successful action for breach of trust. Because the government is

141. *Id.* at 256.

142. 316 U.S. 286 (1942). This case is discussed *supra* at notes 74-77 and accompanying text.

143. *Pyramid Lake*, 354 F. Supp. at 255 ("The issue . . . comes down to whether or not the Secretary's resolution of conflicting demands . . . was effectuated arbitrarily rather than in the sound exercise of discretion.").

144. 460 U.S. 605 (1983). This case is discussed *supra* at notes 55-58 and accompanying text.

145. *Arizona II*, 460 U.S. at 613.

146. *Id.* at 609-29.

147. See Note, *Arizona v. California: Finality as a Water Management Tool*, 33 CATH. U.L. REV. 457, 475 (1984).

148. *Arizona I*, 373 U.S. at 551.

149. *Id.* at 595.

150. *Arizona II*, 460 U.S. at 651-54.

151. See *Nevada*, 463 U.S. at 128, 143.

held to a lower standard of trust, the Indians must make a correspondingly stronger showing.¹⁵² Justice Rehnquist's opinion in *Nevada* could arguably be interpreted as finding no fiduciary duty where the government represents conflicting Indian and non-Indian interests.¹⁵³ The Pyramid Lake Paiute Tribe is thus unable to upset the *Orr Ditch* decree to obtain their full *Winters* entitlement, nor is it likely to obtain damages in breach of trust.

In deciding *Nevada*, the Supreme Court has indicated that non-Indian parties can rely on a prior adjudication of tribal reserved water rights,¹⁵⁴ while at the same time making it more difficult for the tribes to obtain relief where such rights are not fully met under a prior decree.¹⁵⁵ As this note has attempted to demonstrate, these separate facets of the Court's opinion need not be connected.¹⁵⁶ Although innocent third parties should be able to rely on the finality of water rights decrees, adversely affected tribes should be able to obtain relief where government representation has been inadequate. The *Nevada* decision should therefore be restrictively applied by the lower courts in order that Indian as well as non-Indian interests may be protected. Because Justice Rehnquist reduced the government's trust duties in order to enhance the finality of the *Orr Ditch* decree, *Nevada* should apply only where a tribe seeks to reopen a prior decree. Where tribal water rights are litigated in the first instance, however, the private fiduciary standard should govern. A second way to mitigate the impact of *Nevada* is by narrowly defining the conflict of interest situation to which it applies. Courts should require an explicit congressional mandate to the Secretary of the Interior to balance competing interests as he sees fit. By so limiting the application of *Nevada*, those tribes that have received less than their full entitlement of water as a result of compromised advocacy by the United States, may yet be protected.

152. *Id.*

153. Justice Rehnquist stated that "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well." *Nevada*, 463 U.S. at 128. If the *Nevada* decision were interpreted as imposing no duties in the conflict situation, jurisdiction under the Tucker Act, Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified, as amended, at 28 U.S.C. §§ 1491 & 1505) would be called into question in the wake of *Mitchell II*, 463 U.S. 206 (1983). The better argument, however, is that the private fiduciary standard of *Seminole Nation* applies in the nonconflict situation, while a strong fiduciary standard still governs in the conflict situation. See *Nevada*, 463 U.S. at 143.

154. See, e.g., *Nevada*, 463 U.S. at 139; *Arizona II*, 460 U.S. at 609-29.

155. See *supra* notes 138-151 and accompanying text.

156. See *supra* note 134 and accompanying text.

Conclusion

In *Nevada*, the Supreme Court refused to allow the Pyramid Lake Paiute Tribe to increase their reserved water allotment under a 1944 decree, despite evidence that the prior award was deficient. By its ruling, the Court protected the rights of innocent third parties who had relied on the decree. The Court went further than was necessary, however, in holding that the United States cannot be held to the fiduciary standards of *Seminole Nation* where it represents conflicting interests.

Nevada may ultimately mean that those tribes who have suffered from inadequate government representation will not be able to recover for their resultant injury where the government also represented competing non-Indian interests. Ironically, the protection of the federal Indian trust is most needed where the government simultaneously represents conflicting Indian and non-Indian interests. Those tribes that cannot afford to protect their own interests but must instead rely on the government may lose forever valuable water rights through inadequate and conflicting representation. *Nevada* must therefore be restrictively applied so that such tribes may receive adequate compensation for their losses.